


**U.S. DEPARTMENT OF COMMERCE**  
**Patent and Trademark Office**

<b>SERIAL NO.</b>		<b>APPLICANT</b>		<b>PAPER NO.</b>	
74/104891		Brooklyn Bottling Corporation			
<b>MARK</b>				<b>ADDRESS</b>	
TROPICAL FANTASY				Commissioner of Patents and Trademarks Washington, D.C. 20231	
<b>ADDRESS</b>		<b>ACTION NO.</b>		If no fees are enclosed, the address should include the words "BOX 5."	
Barry Kramer Kramer, Brufsky & Cifelli, P.C. P.O. Box 59 Southport, CT 06490		02			
		<b>MAILING DATE</b>		Please provide in all correspondence:	
		07/24/91		1. Filing date, serial number, mark, and applicant's name.	
		<b>REF. NO.</b>		2. Mailing date of this Office action.	
		ZE1-145		3. Your telephone number and ZIP code.	
FORM PTO-1525 (5-90)		U.S. DEPT. OF COM. PAT. & TM OFFICE		4. Examining attorney's name and law office number.	

A PROPER RESPONSE TO THIS OFFICE ACTION MUST BE RECEIVED WITHIN 6 MONTHS FROM THE DATE OF THIS ACTION IN ORDER TO AVOID ABANDONMENT.

7/15/91-104891

This letter responds to the applicant's communication filed on May 6, 1991.

Registration was refused under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), because the mark for which registration is sought so resembles the mark shown in U.S. Registration No. 1273016 as to be likely, when used on the identified goods, to cause confusion, or to cause mistake, or to deceive.

The examining attorney has considered the applicant's arguments carefully but has found them unpersuasive. For the reasons below, the refusal under Section 2(d) is maintained and made FINAL.

The Court in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), listed the principal factors to be considered in determining whether there is a likelihood of confusion under Section 2(d). Any one of the factors listed may be dominant in any given case, depending upon the evidence of record. In this case, the following factors are the most relevant: similarity of the marks, similarity of the goods, and similarity of trade channels of the goods.

The examining attorney must compare the marks for similarities in sound, appearance, meaning or connotation. In *re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Similarity in any one of these elements is sufficient to find a likelihood of confusion. In *re Mack*, 197 USPQ 755 (TTAB 1977).

Ecuabeverage Statement of Material Facts - Exhibit 11

1/2/14/92

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Registrant's marks is FANTASY. Applicant's mark is TROPICAL FANTASY. The mere addition of a term to a registered mark is not sufficient to overcome a likelihood of confusion under Section 2(d). *Coca-Cola Bottling Co. of Memphis, Tennessee, Inc. v. Joseph E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) ("BENGAL" and "BENGAL LANCER"); *Lilly Pulitzer, Inc. v. Lilly Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (CCPA 1967) ("THE LILLY" and "LILLY ANN"); *In re Riddle*, 225 USPQ 630 (TTAB 1985) ("ACCUTUNE" and "RICHARD PETTY'S ACCU TUNE"); *In re Cosvetic Laboratories, Inc.*, 202 USPQ 842 (TTAB 1979) ("HEAD START" and "HEAD START COSVETIC"); *Helga, Inc. v. Helga Howie, Inc.*, 182 USPQ 629 (TTAB 1974) ("HELGA" and "HELGA HOWIE"); *In re Hepperle*, 175 USPQ 512 (TTAB 1972) ("ACAPULCO" and "ACAPULCO GOLD"); *La Maur, Inc. v. Matney*, 167 USPQ 559 (TTAB 1970) ("STYLE" and "ITALIAN STYLE"). Therefore, the addition of the word TROPICAL does not obviate the likelihood of confusion.

Applicant takes exception to the examining attorney's conclusion that TROPICAL is merely a descriptive term, and, therefore, the less significant portion of the mark. However, as evidenced by the attached Lexis/Nexis evidence, TROPICAL is a flavor designation encompassing mango, papaya, coconut and banana flavors. The term is commonly used in the food and beverage industry to describe the flavor of ice cream, soft drinks, frozen yogurt and other products. Moreover, as the attached third party registrations indicate, the Office routinely requires a disclaimer of TROPICAL; the marks cited by applicant are unitary marks in which TROPICAL has another meaning. Applicant merely appropriates registrant's mark and adds the descriptive term TROPICAL to it. Therefore, the dominant portion of applicant's mark, namely, FANTASY, is identical to registrant's mark.

If the marks of the respective parties are identical or highly similar, the examining attorney must consider the commercial relationship between the goods or services of the respective parties carefully to determine whether there is a likelihood of confusion. *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983).

The goods of the parties need not be identical or directly competitive to find a likelihood of confusion. They need only be related in some manner, or the conditions surrounding their marketing be such, that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. *Visa International Service Assoc. v. Bankcard Holders of America*, 211 USPQ 28 (N.D. Cal. 1981); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984); *Guardian Products Co., Inc. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); *In re International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978); *In re William Hodges & Co., Inc.*, 190 USPQ 47 (TTAB 1976).

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Applicant's goods are soft drinks. Registrant's goods are soft drink concentrates. Applicant argues that the goods are dissimilar. However, as stated by the TTAB in *The Seven-Up Co. v. Aaron*, 216 USPQ 807 (TTAB 1982), "the relatedness of [soft drinks and soft drink concentrates] for purposes for assessing likelihood of confusion is, in the Board's view, quite evident." See Also *Pepsi Co, Inc. v. Stanley W. Ferguson, Inc.* 154 USPQ 456 (TTAB 1967).


For the reasons set forth above, the Section 2(d) refusal and the requirement of a disclaimer of TROPICAL are hereby made FINAL.

Please note that the only appropriate responses to a final refusal are either: (1) compliance with the outstanding requirements, if feasible, or (2) filing of an appeal to the Trademark Trial and Appeal Board. 37 C.F.R. Section 2.64(a). If the applicant fails to respond within six months of the mailing date of this refusal, this Office will declare the application abandoned. 37 C.F.R. Section 2.65(a).

Note: The explanation concerning the relationship between applicant and Reggae Imports Ltd. has been accepted and made of record.

The Office has reassigned this application to the undersigned examining attorney.

sbm/PAM

  
Patricia A. Malesardi  
Trademark Attorney  
Law Office 14  
(703) 308-9114 Ext. 38

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1ST STORY of Level 1 printed in KWIC format.

Copyright (c) 1989 The New York Times Company;  
The New York Times

March 8, 1989, Wednesday, Late City Final Edition

SECTION: Section C; Page 4, Column 5; Living Desk

LENGTH: 494 words

HEADLINE: Food of the Future Is Ethnic and Fast

BYLINE: By JOAN NATHAN

DATELINE: BOSTON, March 4

BODY:

... guava and passion fruit drinks, followed by Dole and Welch," he said.  
"Now I predict more tropical flavors and tropical flavor soft drinks."

He says the increase in oat-bran products will continue. "I expect to see  
oat-bran bagels, English ...

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2ND STORY of Level 1 printed in KWIC format.

Copyright (c) 1989 Gorman Publishing Company  
New Product News

March 7, 1989

SECTION: SPECIAL REPORT; Pg. 8

LENGTH: 2022 words

HEADLINE: What's Hot -- What's Not -- For 1989

BODY:

... mavens in the U.S.

8. Tropical Flavors in all beverages (juices, seltzers, waters) with perhaps a major tropical-flavor soft drink introduction.

9. Beans, mostly in gourmet quality chili, but in many new entrees and sidedishes that emphasize ...

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1ST STORY of Level 1 printed in KWIC format.

Copyright (c) 1991 The Washington Post

June 23, 1991, Sunday, Final Edition

SECTION: SUNDAY TRAVEL; PAGE E1

LENGTH: 2951 words

HEADLINE: Asuncion, the Second Time Around;  
Still a Steamy, Slow-Paced Outpost of South America Colonial buildings  
overlooking the Paraguay River in Asuncion.

SERIES: Occasional

BYLINE: James T. Yenckel, Washington Post Staff Writer

BODY:

... thirst with good Paraguayan beer, and air-conditioned ice cream parlors  
serving yummy cones -- called cucuruchos -- of exotic tropical flavors like  
mango and papaya.

For most Americans, Asuncion's historical monuments are probably of minor  
interest. But Paraguay's history has been ...

FEATURE, FOREIGN NEWS TRAVEL AND TOURISM; PARAGUAY

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2ND STORY of Level 1 printed in KWIC format.

Copyright (c) 1991 The Chronicle Publishing Co.  
The San Francisco Chronicle

JUNE 12, 1991, WEDNESDAY, FINAL EDITION

SECTION: FOOD; Pg. 1/ZZ1

LENGTH: 3792 words

HEADLINE: AFRICAN  
INSPIRATION

BYLINE: HEIDI HAUGHY CUSICK, SPECIAL TO THE CHRONICLE

BODY:

... employs the long-cooking and deep-frying methods of his ancestors who married their techniques with the native Indian and immigrant Portuguese styles.

"The tropical flavors and spices are the most appealing aspects of my cooking," says Neto, who has a degree in nutrition.

At Bahia, with ...

RELATED STORY FOOD; RECIPES; BAY AREA

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4TH STORY of Level 1 printed in KWIC format.

Copyright (c) 1991 The Times Mirror Company;  
Los Angeles Times

June 2, 1991, Sunday, Home Edition

SECTION: Travel; Part L; Page 1; Column 3; Travel Desk

LENGTH: 1199 words

HEADLINE: TAKING THE KIDS ALONG;  
IS IT POSSIBLE TO KEEP EVERYONE HAPPY ON A FAMILY TRIP? SURPRISING TALES OF JOY  
FROM THE VACATION FRONT.;  
TODDLING OFF TO MEXICO WITH BABY, STROLLER AND DIAPERS

BYLINE: By GARY SWAN, Swan is a reporter for the San Francisco Chronicle.

BODY:

... For supplemental fluids, he drank plenty of canned and bottled fruit juice. He delighted, in fact, in discovering new tropical flavors such as papaya and mango.

Before we left, the pediatrician recommended child's-strength Imodium, an over-the-counter medicine for stomach ...



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5TH STORY of Level 1 printed in KWIC format.

Copyright (c) 1991 The Chronicle Publishing Co.  
The San Francisco Chronicle

MAY 22, 1991, WEDNESDAY, FINAL EDITION

SECTION: FOOD; Pg. 1/ZZ1

LENGTH: 3463 words

HEADLINE: Culinary notes from a native son trace the Golden State's heritage  
through recipes  
CALIFORNIA COOK

BYLINE: JOHN PHILLIP CARROLL, SPECIAL TO THE CHRONICLE

BODY:

... day before serving.

If you want a less caloric dessert, Kiwi Sherbet is a light finish with a  
cool, tropical flavor./

This fruit got a bum rap because it was an overused garnish in the '70s. When  
ripe and sweet, it is quite ...

FOOD; RECIPES; BOOKS; CA

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3RD STORY of Level 1 printed in KWIC format.

Copyright (c) 1991 The New York Times Company  
The New York Times

June 5, 1991, Wednesday, Late Edition - Final

SECTION: Section C; Page 4; Column 1; Living Desk

LENGTH: 1103 words

HEADLINE: Food Notes

BYLINE: By Florence Fabricant

... P.M. Monday to Saturday, 11 A.M. to 7 P.M. on Sunday. Credit cards are accepted; (212) 877-5757. Tropical Flavors

Fans of ice cream and other frozen desserts now have more choices than ever. In the ice-cream department, Goya Foods has introduced ice cream in tropical flavors like coconut, banana chip and mango-vanilla. There are also vanilla, strawberry and butter pecan.

The ice cream is about \$1.99 a ...

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